

December 17, 2002

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Re: Your FOIA appeal dated November 15, 2002

Dear Mr. Meyer:

On September 26, 2002, you filed a Freedom of Information Act (FOIA) request with NCUA's Office of Inspector General (OIG) on behalf of your client, (b)(6). You requested copies of all board minutes for (b)(7A) & (8) from 1997 until the present; reports generated by NCUA's investigation into the affairs of (b)(7)(A) & (b)(8); and other records or documentation pertaining to or generated as a result of NCUA's investigation of (b)(8). The OIG responded to your request on October 15, 2002, stating that they had no responsive documents. You appealed the OIG decision on October 21, 2002. NCUA staff attorney Paul Peterson contacted you by telephone on October 24, 2002, informing you that although NCUA's OIG did not have any responsive documents, other NCUA offices did. You agreed to hold your October 21<sup>st</sup> appeal in abeyance until your receipt of the NCUA FOIA Officer's response to your request. Dianne Salva, NCUA's FOIA Officer, responded to your request on October 31, 2002. Enclosed with her response were 21 pages of responsive documents. The remaining responsive documents (approximately 233 pages of minutes from (b)(7)(A)(8) board meetings and approximately 231 pages of examination and investigatory documents (both documents generated during examination/investigation and obtained during examination/investigation, internal memoranda, drafts and other documents) were withheld from disclosure pursuant to exemptions 4, 5, 6, 7(A), 7(C), and 8 of the FOIA. 5 U.S.C. §552(b)(4), (5), (6), (7)(A), (7)(C), and (8). On November 15, 2002, you appealed Ms. Salva's withholding of documents and renewed your October 21, 2002, appeal of the OIG's response that they held no documents responsive to your request. Your appeal is granted in part and denied in part. Twenty pages are released in part with exempt material redacted. The twenty pages are enclosed. The redacted material is withheld pursuant to exemptions 6, 7(A), and 7(C). The remaining approximately 444 pages continue to be withheld pursuant to exemptions 4, 5, 6, 7(A), 7(C), and 8 of the FOIA, as outlined below. Your appeal of the OIG determination that they have no responsive documents is denied.

## Exemption 4

The (b)(7)(A)& (8) board meeting minutes are withheld pursuant to exemption 4. The minutes are also withheld pursuant to exemption 8 and portions are withheld pursuant to exemption 6 and 7(A) (*see* discussion below). Exemption 4 of the FOIA protects, in part, commercial or financial information obtained from a person and privileged or confidential. 5 U.S.C. 552(b)(4). The information withheld pursuant to exemption 4 falls into the category of commercial/financial information. The term "commercial" has been interpreted to include anything "pertaining or relating to or dealing with commerce." American Airlines, Inc. v. National Mediation Board, 588 F.2d 863, 870 (2d Cir. 1978). The board meeting minutes withheld pursuant to exemption 4 meet the broad interpretation of commercial or financial information. Information "obtained from a person" has been held to include information obtained from a corporation. Nadler v. FDIC, 92 F.3d 93, 95 (2d Cir. 1996). Information obtained from a credit union meets the standard of obtained "from a person" under Nadler. In Critical Mass Energy Project v. NRC, 975 F.2d 871 (D.C. Cir. 1992), cert. denied, 507 U.S. 984 (1993), the court established two distinct standards to be used in determining whether

commercial/financial information submitted to an agency is “confidential” under exemption 4. According to Critical Mass, information that is voluntarily submitted is categorically protected provided it is not customarily disclosed to the public by the submitter. Information required to be submitted to an agency is confidential if its release would (1) impair the Government’s ability to obtain necessary information in the future; or (2) cause substantial harm to the competitive position of the person from whom the information was obtained. See National Parks & Conservation Association v. Morton, 498 F.2d 765 (D.C. Cir. 1974). We believe the information withheld meets the more strict substantial harm prong of National Parks as noted in Critical Mass. Therefore, the board minutes continue to be withheld pursuant 4.

Outside of the FOIA context, a member of a credit union has inspection rights similar to those of a shareholder in a corporation, and state law determines the types of information and documents (e.g. board meeting minutes), and the degree of access, available to a shareholder/member. The general rule in most jurisdictions is that a shareholder is entitled to inspect corporate minutes and other records as long as he has a proper, nonvexatious purpose. You may wish to consult the appropriate state law if your client still qualifies as a member of (b)(7)(A) &(8).

## **Exemption 5**

Draft documents and internal memoranda are withheld pursuant to exemption 5. Exemption 5 of the FOIA protects “inter-agency or intra-agency memorandums or letters which would not be available by law to a party ... in litigation with the agency.” 5 U.S.C. §552(b)(5). Included within exemption 5 is information subject to the deliberative process privilege and attorney work-product privilege. The purpose of the deliberative process privilege is “to prevent injury to the quality of agency decisions.” NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 151 (1975). Any one of the following three policy purposes have been held to constitute a basis for the deliberative process privilege: (1) to encourage open, frank discussions on matters of policy between subordinates and superiors; (2) to protect against premature disclosure of proposed policies before they are finally adopted; and (3) to protect against public confusion that might result from disclosure of reasons and rationales that were not in fact ultimately the grounds for an agency’s action. Russell v. Department of the Air Force, 682 F.2d 1045 (D.C. Cir. 1982). All three policies enumerated in Russell apply in this case and draft documents and internal memoranda continue to be withheld pursuant to exemption 5.

The attorney work product privilege protects documents prepared by an attorney in contemplation of litigation. Hickman v. Taylor, 329 U.S. 495 (1947). The privilege attaches when a claim, likely to lead to litigation, has arisen. Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854 (D.C. Cir. 1980). Litigation need never have actually commenced in order to invoke this privilege. Kent Corp. v. NLRB, 530 F.2d 612 (5<sup>th</sup> Cir. 1976). The attorney-generated documents continue to be withheld pursuant to the attorney work product privilege.

## **Exemptions 6 and 7(C)**

The information withheld pursuant to exemptions 6 and 7(C) includes names and other identifying information of credit union borrowers (many of whom were delinquent) and personal information about credit union members, officials and employees. Exemption 6 protects information about an individual in “personnel and medical files and similar files” where the disclosure of such information “would constitute a clearly unwarranted invasion of personal privacy.” 5 U.S.C. 552(b)(6). Exception 7(C) protects information compiled for law enforcement purposes that, if released, “could reasonably be expected to constitute an unwarranted invasion of personal privacy.” 5 U.S.C. 552(b)(7)(C). FOIA case law has established that law enforcement includes civil, criminal and administrative proceedings. Center for National Policy Review on Race & Urban Issues v. Weinberger, 502 F.2d 370 (D.C. Cir. 1974). The courts have held that all information that applies to a particular individual meets the threshold requirement for privacy protection. United States Department of State v. Washington Post Co., 456 U.S. 595 (1982). Once a privacy interest is established, application of exemption 6 requires a balancing of the public’s right to disclosure against the individual’s right to privacy. Department of the Air Force v. Rose, 425 U.S. 352, 372 (1976). The withheld information meets the requirement for exemption 6 protection. There is minimal, if any, public interest in disclosing this personal information. The individuals’ privacy interests outweigh any public interest in disclosure. In SafeCard

Services v. SEC, 926 F.2d 1197, 1206 (D.C. Cir. 1989), the court held that the categorical withholding of information that identifies third parties in law enforcement records is appropriate. The balancing used for exemption 6 materials is not necessary for withholding information pursuant to exemption 7(C). Hence, all personal information continues to be withheld pursuant to exemptions 6 and 7(C).

## **Exemption 7(A)**

The investigatory files are withheld pursuant to exemption 7(A). Exemption 7(A) authorizes the withholding of “records or information compiled for law enforcement purposes, but only to the extent that production of such law enforcement records or information...could reasonably be expected to interfere with enforcement proceedings.” 5 U.S.C. 552(b)(7)(A). Criminal, civil and administrative proceedings have all been held to be law enforcement proceedings for purposes of this exemption. See Center for National Policy Review, above. A two-step test is necessary in order to determine the applicability of exemption 7(A). First, a law enforcement proceeding must be pending or contemplated (Mapother v. Department of Justice, 3 F.2d 58 (D.C. Cir. 1984)); and second; release of information about it could generally interfere with enforcement proceedings. Wichlacz v. United States Department of Interior, 938 F. Supp. 325, 331 (E.D. Va. 1996). The two-part test is met in this case. Therefore the investigatory documents continue to be withheld pursuant to exemption 7(A).

## **Exemption 8**

Credit union examinations and documents obtained during examinations (board meeting minutes) are withheld pursuant to exemption 8. Exemption 8 applies to information “contained in or related to examination, operating or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions.”

5 U.S.C. 552(b)(8).

The courts have discerned two major purposes for exemption 8 from its legislative history: 1) to protect the security of financial institutions by withholding from the public reports that contain frank evaluations of a bank’s stability; and 2) to promote cooperation and communication between employees and examiners. See Atkinson v. FDIC, 1 GDS 80,034, at 80,102 (D.C.Cir. 1980). Courts have interpreted exemption 8 broadly and have declined to restrict its all-inclusive scope. Consumers Union of United States, Inc. v. Heimann, 589 F.2d 531 (D.C. Cir. 1978). Courts have generally not required agencies to segregate and disclose portions of documents unrelated to the financial condition of the institution. See Atkinson at 80,103. It is appropriate to withhold entire documents pursuant to this exemption. In general, all records, regardless of the source, of a credit union’s financial condition and operations that are in the possession of NCUA are exempt. See McCullough v. FDIC, 1 Gov’t. Disclosure Serv. (P-H) §80,194 at 80,495 (D.D.C. 7/28/80). We believe that the purposes of exemption 8 are met; therefore the examination documents and documents obtained during an examination that reflect the credit union’s financial condition continue to be withheld in their entirety pursuant to exemption 8.

## **Appeal of OIG determination**

The OIG responded to your September 26, 2002 FOIA request on October 15<sup>th</sup>, 2002, stating that they had no documents responsive to your request. You appealed the OIG determination on October 21<sup>st</sup> and then put the appeal on hold until NCUA’s FOIA Officer responded to your request. The FOIA Officer determined that there close to 500 pages of documents responsive to your request, most of which were exempt from disclosure. In your November 15<sup>th</sup> appeal of the FOIA Officers determination, you asked that your October 21<sup>st</sup> appeal of the OIG determination that OIG had no responsive documents be reinstated. The OIG was not involved in the examination or investigation of (b)(7) & (8). Therefore, they would have no responsive documents. Your appeal of the OIG determination is denied.

Pursuant to 5 U.S.C. 552(a)(4)(B) of the FOIA, you may seek judicial review of this determination by filing suit

against the NCUA. Such a suit may be filed in the United States District Court in the district where the requestor resides, where the requestor's principal place of business is located, the District of Columbia, or where the documents are located (the Eastern District of Virginia).

Sincerely,

Robert M. Fenner

General Counsel

Enclosures

GC/HMU:bhs

02-1146

FOIA 02-367